Florida State University Law Review

Volume 1 | Issue 2 Article 1

Spring 1973

Some Highlights of the New Federal Rules of Evidence

Mason Ladd
Florida State University

FLORIDA STATE UNIVERSITY LAW REVIEW

VOLUME 1 SPRING 1973 NUMBER 2

SOME HIGHLIGHTS OF THE NEW FEDERAL RULES OF EVIDENCE

MASON LADD*

INTRODUCTION

The new Federal Rules of Evidence were approved by the Supreme Court of the United States on November 20, 1972, for filing with Congress in the session commencing in January 1973. If they are approved by Congress the Rules become final in their application to federal courts.[1] In the long process of their drafting, the proposed drafts were made available to Congress and many helpful suggestions came from lawyer members; some suggestions were adopted and others ironed out.

The first draft was printed in the Federal Reports in March 1967, and suggestions and criticism from members of the bench and bar were requested. The response was voluminous, running into thousands of pages, and very valuable. It came from individual lawyers, judges and committees of bar organizations. Every criticism and suggestion was considered and many changes were made in a revised draft, which was also submitted for consideration by the legal profession through publication in the Federal Reports in March 1971. With the additional response, the Advisory Committee on Rules of Evidence and the Standing Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States had the benefit of exhaustive observations upon almost every aspect of the proposed rules. Some further changes were made and a final draft was approved by the Judicial Conference of the United States for processing through the Supreme Court and the Congress under the rulemaking authority.

Many other sources of research were used in the drafting of the Rules including writings in legal periodicals and text authorities, the Model Code of Evidence of the American Law Institute, the Uniform Rules of Evidence of the National Conference of Commissioners on

* Dean Emeritus, Colleges of Law, Florida State University and University of Iowa. A.B., Grinnell College, 1920; J.D., University of Iowa, 1923; S.J.D., Harvard University, 1935; LL.D., Grinnell College, 1954.

1. Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9, requires congressional approval of the Rules, changing the procedure of 18 U.S.C. § 3771 (1970) and 28 U.S.C. §§ 2072, 2075 (1970). *See* 41 U.S.L.W. 2542 (April 17, 1973).

Uniform State Laws and the new codes of evidence of California, New Jersey, Kansas and the Virgin Islands. Full consideration was given to the case law of state and federal courts in the search for the most desirable rules. The extensive notes to the Rules explain the reasons for adoption, refer to the source materials for the Rules and give an indication of the wide scope of research and thoroughness of their preparation. The Advisory Committee, composed of outstanding trial lawyers, district judges of federal courts and evidence teachers, was concerned with both the principle and the practicality of the Rules in controlling admissibility and exclusion of evidence. The Rules are believed to represent the best of present-day thinking upon the subject of evidence and are destined to have a great influence upon the laws of states in the adoption of new evidence codes, similar to the influence of the Federal Rules of Civil Procedure on state civil procedure codes. They should lead the way to improving the law of evidence and to obtaining a uniformity of rules for the benefit of lawyers and judges. Each of the Rules could be called a highlight when applied to the litigated issues of fact in a trial. The highlights selected for discussion in this article are matters of interest to all members of the bar. Some are highlights because they cover significant changes the Rules make in the law of at least some jurisdictions, others because they involve issues over which there is great controversy, which the Rules resolve for federal courts.

I. The Meaning of Hearsay

Sections (a), (b) and (c) of rule 801 define what is hearsay, and section (d) designates statements that are not hearsay. Much in these sections resolves hard-fought controversies and covers matters frequently arising in trials.

The definition of hearsay is tersely and simply stated:

> (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.
>
> (b) Declarant. A "declarant" is a person who makes a statement.
>
> (c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Out-of-court statements of a person and conduct intended to be an assertion offered in court as evidence to prove the truth of the matter stated are regarded by all courts as being hearsay. This fits into the conception of the function of a witness upon the witness

stand, which is to testify about what he personally knows upon a matter perceived by him and not what others have said about the facts in issue or what he thinks about the facts perceived by him. Testimony as to what others have said is objectionable as hearsay, and testimony as to what one thinks about the facts is excludable as opinion.[2] Both exclusions are, of course, subject to exceptions.

A. Nonverbal Conduct

All of rule 801(a), (b) and (c) represents the law as it now exists in the Anglo-American scheme. The conflict comes with nonverbal conduct, a term not included in the Rules' definition of hearsay. Under rule 801(a)(2) nonverbal conduct constitutes a "statement" only if the conduct was intended by the actor to be an assertion by him. If a person had no intent that his conduct be the assertion of a fact, the conduct, when offered as proof of the inference of fact deduced from it, is not hearsay under the rule. Thus conduct from which a relevant fact may be reasonably inferred is admissible as evidence of the inferred fact and the hearsay rule of exclusion has no application. Like much circumstantial evidence, the inferred fact is free from the motive to falsify and represents the true belief of what the facts are by the person whose conduct has been proved. As the person did not intend his conduct to be a communication, there is no danger that the inference of fact from it is an intentional falsification. The exceptions give insight into what is hearsay. It must involve a situation in which the mind of the declarant is directed to the statement and in which there is a danger that he will represent the facts falsely.[3] Statements admitted under the exceptions are still hearsay, but the fear of fabrication is minimized because of the circumstances required for the exception. Inferences implied from conduct do not reflect the intention of the actor to state the inferred fact, and the possibility of an intentional untruth is rarely, if ever, present.

If a person's action is intended by him as an assertion, it is a hearsay statement, and if testimony of the conduct is offered in a trial, it is excluded under rule 802, unless it can be fitted into one of the enumerated exceptions. To illustrate, a nod of the head is equivalent to the assertion "yes" to a question calling for a "yes" or "no" answer. The raising of a hand by a member of a group when asked

2. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 501, 524 (1898).

3. *See generally* Ladd, *The Relationship of the Principles of Exclusionary Rules of Evidence to the Problem of Proof*, 18 MINN. L. REV. 506, 509-16 (1934); Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 749-60 (1961).

who did a certain thing amounts to an answer "I did."[4] The assertive aspect of hearsay conduct is quite different from the testimony, offered as evidence that it was a cold day, of one who had looked out the window in the winter and had seen that people on the streets had their overcoats on with their collars pulled up.

Other illustrations may be helpful in understanding the problem. If *A* writes a letter to *B*, with whom he is well acquainted, and asks him to become an active partner in *A*'s business, there is an inference that *A* regarded *B* to be a person of sound mind, capable of engaging in the business. If *B* dies and an action is brought to set aside his will on the ground of mental incapacity, the letter to *B* making the above proposal, when offered in evidence to prove the soundness of *B*'s mind, creates an inference of *A*'s opinion that *B* had mental capacity sufficient to make a will. Was the letter hearsay? The famous English case of *Wright v. Doe Dem. Sandford Tatham*[5] rejected, under somewhat similar circumstances, the admission of a letter as hearsay evidence of opinion. It was treated as an assertion by the actor of the fact inferred from the conduct. In an Iowa case, *State v. Minella,*[6] in which *A* was indicted for the murder of X, *A* and *B* were standing together when one of them fired a shot killing X. When the investigation of the crime commenced, *B* fled from the community and at the trial was not available as a witness. The court held that the flight by *B* could not be considered to show that *B*, not *A*, committed the murder. The court regarded the flight of *B* to be the same as his confession and inadmissible as a hearsay confession of a third party. Could the flight of *B* be said to be a statement by him that he was guilty of the crime? It is conduct from which an inference of guilt could be drawn, but *B* by fleeing surely had no intention of stating that he was guilty. The inference is the same whether the flight is by a third person or by a party in the trial. In a late Florida case, *Busbee v. Quarrier,*[7] a father brought an action for the wrongful death of a minor son against the operator of an automobile that struck the son from behind while he was operating a bicycle. Judge Sturgis commented on the flight of the defendant as an admission by conduct stating, "[a] person driving an automobile does not ordinarily

4. On assertive and nonassertive conduct, see Falknor, *The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct,* 33 ROCKY MT. L. REV. 133 (1961); McCormick, *The Borderland of Hearsay,* 39 YALE L.J. 489 (1930); Rucker, *The Twilight Zone of Hearsay,* 9 VAND. L. REV. 453 (1956); Wheaton, *What is Hearsay?,* 46 IOWA L. REV. 210 (1961).

5. 112 Eng. Rep. 488 (1837).

6. 158 N.W. 645, 655 (Iowa 1916).

7. 172 So. 2d 17 (Fla. 1st Dist. Ct. App. 1965).

run down bicyclists or pedestrians on the highway, and if he does, he takes some notice of it, even if he ultimately decides on flight or falsehood to protect himself. If he decides on flight, it calls into operation the presumption of conscious guilt, commonly inferred therefrom in criminal cases and properly to be considered in civil cases."[8] Flight by a party to litigation from events causing a tort or crime creates an inference that he is responsible for what occurred and the fact is admissible to prove the party's liability or guilt. It is not necessary for admissibility that an inference drawn from conduct be the only inference that could be made so long as it is the strongest inference in logic and reason. One who flees from the scene of a crime may have fled because of fear that he would be wrongly charged with it or because he may not want to be involved, but the most logical evaluation judged from human behavior generally is that he fled because of guilt. It is sometimes looked upon as a statement admitting what had occurred, and its acceptability as proof is based upon the admissions exception to the hearsay rule. The justification for the admissibility is a logical inference from conduct that he is at fault although he did not intend to say so and would probably deny it. This is the reason the federal rule does not include nonassertive conduct in its definition of hearsay and permits the inference from conduct to be direct evidence of the inferred fact.

Because some courts confused the meanings of hearsay and inference from conduct, the Model Code of Evidence identified inference from conduct as hearsay and provided exceptions that admit most of the testimony. Model Code rule 501(1) defines a statement regarded as hearsay in these terms: "A statement includes both conduct found by the judge to have been intended by the person making the statement to operate as an assertion by him and conduct of which evidence is offered for a purpose requiring an assumption that it was so intended." The Uniform Rules of Evidence did not follow the Model Code but took the position subsequently adopted in the new Federal Rules. Uniform rule 62(1), in defining a "statement," included "nonverbal conduct of a person intended by him as a substitute for words and in expressing the matter stated." It did not include conduct that was not so intended. The Uniform rule has been criticized because of the chance that the actor engaged in the nonverbal conduct could have been mistaken in the facts that gave rise to the conduct. While the conduct may dispel the danger of intentional falsification, cross-examination of the actor in court is needed to ex-

8. *Id.* at 22.

pose mistake of facts causing his conduct.[9] The notes to the Federal Rules admit this possibility but state that "the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds." A further answer to the criticism is that the same reasoning, if applied to the hearsay exceptions when the declarant is not present as a witness in the trial, would eliminate the exceptions. The circumstantial probability of reliability required to establish an exception gives strength to the declaration as being free from the motive to falsify but does not preclude mistake in the facts declared. The circumstantial element of proof, found in facts implied from conduct not intended as an assertion, is strong enough to let the conduct be what it is, rather than to create a fiction that it constitutes a statement. Relevant inferences should not be excluded as hearsay when based upon logical deductions from conduct. Nonassertive conduct is usually of a kind that the actor would not be moved to act if the inferred fact were not true. The circumstances must be strong enough for the inference to gain a sufficient standing to meet the test of relevancy.[10] The danger of mistake of fact is no greater here than for a spontaneous utterance admitted as an exception to the hearsay

---

9. For an ably written article developing this view, see Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence,* 14 STAN. L. REV. 682 (1962). Also discussing the problem is Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 HARV. L. REV. 177, 214-18 (1948).

10. The process of weighing the circumstances was discussed in State v. Sorensen, 455 P.2d 981, 987 (Ariz. 1969), in determining whether absence of flight was relevant to show innocence. Chief Judge Hathaway stated:

> The defendant requested that an instruction on absence of flight should have been given, arguing that "where flight is shown in the evidence, an instruction thereon is proper and not an undue comment on the evidence." State v. McLain, 74 Ariz. 132, 245 P.2d 278 (1952). Instructions on flight seem to be premised on "* * * the supposition that with a consciousness of guilt, 'the wicked flee when no man pursueth' to avoid punishment," as observed by this Court though [*sic*] Justice Lorna E. Lockwood in State v. Owen, 94 Ariz. 404, 411, 385 P.2d 700 (1963), vacated, 378 U.S. 574, 84 S.Ct. 1932, 12 L.Ed.2d 1041. Considering the rest of the proverb, "* * * but the righteous are bold as a lion," it would seem to follow that boldness infers innocence. Contemplated, however, is the state of mind of the guilty and the innocent. Verily, flight to escape detection or capture is circumstantial evidence of guilt. Absence of flight under other circumstances may seem far better calculated to avoid detection. Absence of flight does not necessarily reflect the state of mind. Would that detection of criminals were so simple.
>
> We see no prejudice to the defendant, in the trial court's refusal to give the instruction, since the jury is free to draw all reasonable inferences from the absence of flight, without specific instructions from the court. The matter is more properly one of argument.

See also note 11 *infra.*

rule.[11] Therefore the possible danger of error of fact should not be used to require conduct to be defined as a statement when it is not so intended. The position of the new Federal Rules is to leave the determination of the admissibility of nonassertive conduct to the strength of the circumstances giving rise to the inference of fact.[12]

B. Statements Specified as Not Hearsay

Surely one of the highest highlights of the new evidence Rules is rule 801 (d), entitled "statements which are not hearsay." This section deals with realistic and needed improvements in the law. Subsection (1) deals with prior statements by a witness, and subsection (2) covers the subject of admissions by a party-opponent. Each will be considered separately.

1. *Prior Statements by a Witness.*—Rule 801 (d) (1) says:

> (d) Statements which are not hearsay. A statement is not hearsay if—
>
> (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him . . . .

Parts (A) and (B) of the rule are concerned with the use of prior out-of-court statements of a witness admitted for impeachment because of their inconsistency with the testimony given in court, and with the use of those statements admitted to rebut a claim by the wit-

11. For a discussion of spontaneous utterances, see Ladd, *supra* note 3, at 513-14.

12. In determining whether conduct creates an inference of a fact, care must be used in evaluating the strength of the inference. This is closely associated with a consideration of relevancy of the circumstances from which the inference is drawn to the facts to be inferred. The Federal Rules (in Article IV, "Relevancy and Its Limits") exclude conduct with certain possible but insufficient inferences in the following matters: (1) subsequent remedial measures taken which, if taken previously, would have made an event less likely to have occurred (rule 407); (2) compromise and offers to compromise to show an acknowledgment of liability (rule 408); (3) payment of medical and similar expenses as an inference that the party was responsible for them (rule 409); (4) offer to plead guilty, *nolo contendere,* and a withdrawn plea of guilty as evidence of guilt (rule 410); and (5) evidence that a person had or did not have liability insurance as an inference upon the issue of negligence (rule 411). One reason for the exclusion is that other factors are more likely to have caused the conduct than belief by a party that he motivated the conduct. This involves an evaluation judgment upon what may reasonably be inferred from the conduct in order to make the conduct relevant. The strongest reason to exclude the above evidence is the public policy aspect that people should be encouraged to do the things specified without fear that their action will be used against them.

ness that his testimony was a recent fabrication resulting from an improper influence or motive to falsify. How may the triers of fact consider these statements? Are they admissible only to neutralize the effect of the testimony given in the trial or to dispel any belief that the testimony was the product of ulterior motives or influence? Can the impeaching statements do more than impeach? Can prior consistent statements made before the motive to falsify arose or the alleged influence occurred be used by the triers of fact for a purpose other than to show that the testimony given in the trial was free from such influence? Are impeaching and corroborating statements that have met the procedural requirements for admissibility limited to testing credibility? Can they also be considered as substantive evidence of the truth of the facts asserted in the out-of-court statements?

Most courts have rigidly restricted out-of-court statements of a witness, whether consistent or inconsistent, to use in determining the credit to be given to the testimony.[13] These statements are among the most common methods of testing credibility, and the usual practice is that the court instructs the jurors that the prior statements shall not be used by them as proof of the facts stated.[14] The reason usually given is that the statements of a witness made by him out of court are hearsay.[15] Although various reasons for the hearsay rule have been stated by the courts, the universally accepted reason, stated by Dean John Henry Wigmore, is the lack of opportunity to cross-examine as a testing process in the attempt to discover the truth.[16] Professor Edmund M. Morgan added a reason that was implied by Dean Wigmore: absence of an oath to tell the truth. Professor Morgan's statement of the reason for the hearsay rule is that "[h]earsay is excluded because of potential infirmities with respect to the observation, memory, narration and veracity of him who utters the offered words when not under oath and subject to cross-examination."[17] It is with these concepts as the reasons for the hearsay rule that the change in the law was made in rule 801 (d) (1), providing that prior statements of a witness, testifying under oath in a trial, are not hearsay when offered as inconsistent statements to impeach or as consistent state-

13. *See, e.g.,* Comer v. State, 257 S.W.2d 564 (Ark. 1953); People v. Tate, 197 N.E.2d 26 (Ill. 1964); Wininger v. Day, 376 P.2d 206 (Okla. 1962). *But see* note 26 and accompanying text *infra.*

14. *See* Bartley v. United States, 319 F.2d 717, 719-20 (D.C. Cir. 1963).

15. *See* C. McCORMICK, EVIDENCE § 251 (2d ed. 1972); 3A J. WIGMORE, EVIDENCE § 1018 (b) (rev. ed. 1970); Ladd, *Some Observations on Credibility: Impeachment of Witnesses,* 52 CORNELL L.Q. 239, 249-51 (1967).

16. 5 J. WIGMORE, EVIDENCE §§ 1361-62 (3d ed. 1940).

17. Morgan, *The Law of Evidence, 1941-1945,* 59 HARV. L. REV. 481, 541 (1946).

ments to rebut recent fabrication. Thus, when impeaching and consistent statements become admissible under the provisions of rules 607 and 613, they may be considered both as they affect the credibility of the witness and as substantive proof of the facts asserted in them.

The position taken in the Federal Rules has substantial judicial authority supporting it.[18] The Model Code of Evidence of the American Law Institute[19] and the Uniform Rules of Evidence of the National Conference of Commissioners on Uniform State Laws[20] reached the same result as the Federal Rules, but did so by regarding the out-of-court statement as hearsay and creating an exception for its admission and use as substantive evidence. The reason for creating the exception was that the safeguards for truth testing were present if the declarant testified in court and was available for cross-examination. This is the same reason the federal rule states that the out-of-court statement is not hearsay if it is made by one testifying in the trial.

The most striking decision on the subject is the United States Supreme Court case of *California v. Green*.[21] Section 1235 of the new California Code of Evidence,[22] which became effective January 1, 1967, and which is similar to the new Federal Rules, was challenged as an unconstitutional limitation on the defendant's right of confrontation guaranteed by the sixth amendment. The Court rejected the holding of the California Supreme Court in *People v. Johnson*[23] where, on the same issue, the amendment was held to have been violated. Justice White, for the *Green* majority, had the following observations:[24]

> Viewed historically, then, there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination.
>
> . . . .
>
> It is, of course, true that the out-of-court statement may have been made under circumstances subject to none of these protections.

18. *See* the opinions of Judge Friendly in United States v. De Sisto, 329 F.2d 929 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964); Judge Learned Hand in United States v. Allied Stevedoring Corp., 241 F.2d 925 (2d Cir.), *cert. denied*, 353 U.S. 984 (1957) and Di Carlo v. United States, 6 F.2d 364 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925); Judge Phillips in Curtis v. United States, 67 F.2d 943 (10th Cir. 1933); Judge Doerner in Turner v. Caldwell, 349 S.W.2d 493 (Mo. Ct. App. 1961) and Blanks v. St. Louis Public Serv. Co., 342 S.W.2d 272 (Mo. Ct. App. 1961).

19. MODEL CODE OF EVIDENCE rule 503(b) (1942).

20. UNIFORM RULE OF EVIDENCE 63(1).

21. 399 U.S. 149 (1970).

22. CAL. EVID. CODE § 1235 (West 1968).

23. 441 P.2d 111, 68 Cal. Rptr. 599 (1968), *cert. denied*, 393 U.S. 1051 (1969).

24. 399 U.S. at 158-59.

> But if the declarant is present and testifying at trial, the out-of-court statement for all practical purposes regains most of the lost protections. If the witness admits the prior statement is his, or if there is other evidence to show the statement is his, the danger of faulty reproduction is negligible and the jury can be confident that it has before it two conflicting statements by the same witness. Thus, as far as the oath is concerned, the witness must now affirm, deny, or qualify the truth of the prior statement under the penalty of perjury; indeed, the very fact that the prior statement was not given under a similar circumstance may become the witness' explanation for its inaccuracy—an explanation a jury may be expected to understand and take into account in deciding which, if either, of the statements represents the truth.

The new federal rule is sound in reason and is practical and realistic. The witness who perceived the events in issue is present in court and has given testimony of those events under oath. If he admits making the inconsistent statement, he has the opportunity to explain it. If his explanation is not acceptable to the triers of fact, they may use what he admitted to be a prior inconsistent statement to discredit his testimony. If the triers of fact believed the witness spoke the truth in the prior statement that he admitted making, it is not reasonable to expect the triers to limit its use to credibility in their decision-making process regardless of a court's instruction that it may be used to discredit but not to prove. The mental gymnastics required to articulate and segregate the use of prior statements for impeachment purposes only makes the limitation rule a formalistic fiction in disregard of realism.

Another aspect of the problem arises when the witness denies he made the inconsistent statement and the person to whom he is alleged to have made the statement testifies that he did make the statement. It may be argued that a statement the witness had not made could thus be used as substantive evidence against the party adversely affected, but this argument is fallacious. This assertion would apply to preclude all use of prior statements for impeachment as well as for substantive purposes. Before a prior statement can be used by the triers of fact to impeach, the triers of fact must first determine that the statement was in fact made, and the same is true if the statement would be used as proof on the substantive issue. If the triers concluded the statement had not been made they could not use it for any purpose.

The basic matter settled by the new federal rule is that prior statements of a nonparty-witness, when admissible for impeachment purposes or to rebut a claim of recent fabrication, are not hearsay and cannot be limited in their use on that ground. The declarant of

the prior statement is testifying in court under oath about events perceived by him, and the opportunity to cross-examine him in respect to what he knows about the events eliminates the dangers that the hearsay rule was designed to avoid. The same problem does not exist with a party-witness because his admissions constitute substantive evidence and their admissibility is not dependent upon inconsistent testimony given at the trial.[25]

An interesting and very recent decision by the Florida Third District Court of Appeal, *Wallace v. Rashkow*,[26] gives some new light upon the problem in Florida and may pave the way to place the law of this state in accord with rule 801(d)(1)(A) and (B) discussed above. The plaintiff driver brought an action for damages sustained in a four-automobile rear-end collision case. He claimed the car ahead stopped on the highway and that he brought his car to a stop some distance back, but that the two vehicles to the rear ran into his car causing it to strike the car ahead. The defendants were the drivers of the other three cars. The evidence was in conflict on whether the plaintiff's car was struck and pushed into the car ahead or whether he struck the car first and was thereafter hit by the cars from the rear. A witness called by the plaintiff testified that he saw the accident from his backyard which was adjacent to the highway and that the plaintiff's vehicle was stopped, or almost stopped, twenty or thirty feet behind the first car at the time it was struck by the other two cars. On cross-examination the witness was impeached by a prior inconsistent written statement stating that the plaintiff's car struck the car ahead first. Over the plaintiff's objection this statement was admitted and the trial court refused to instruct the jury that the extrajudicial inconsistent statement could be used only to discredit the testimony that the witness gave in court, but that it could not be used as substantive proof. The jury returned a verdict against any recovery by the plaintiff. The principal error assigned on appeal by the plaintiff was the failure of the trial court to give the limited instruction.

Associate Judge Ward, in his opinion affirming the lower court, recognized the rule almost universally followed in the past that impeaching statements of a nonparty-witness could be used only to discredit the testimony given by the witness in the trial and to neutralize its effect, rather than constitute substantive evidence of the fact stated in the impeachment. He pointed out that the rule had not been considered by appellate courts in Florida since 1911 when the supreme court stated in *Tomlinson v. Peninsular Naval Stores Co.*[27] that "[p]rior

25. The subject of admissions is separately considered. *See* p. 207 *infra*.

26. 270 So. 2d 743 (Fla. 3d Dist. Ct. App. 1972).

27. 55 So. 548 (Fla. 1911).

inconsistent statements may affect credibility, but they are not evidence to prove a fact not otherwise shown." He regarded the words "not otherwise shown" to mean that, if there were other evidence introduced upon the matter contained in the inconsistent statement, the impeaching evidence could be used as substantive proof. Apparently his view was that, if the impeaching statement were the only evidence upon an essential fact to sustain a party's claim, it would not be substantively sufficient to uphold a verdict. Here there was other evidence that the plaintiff struck the car ahead before he was hit by the vehicles from the rear. Therefore, the impeaching statement to the same effect could be used as proof of that fact. The appellate court regarded a limitation instruction to be mere verbal ritual that jurors would neither understand nor attempt to follow. The court cited the opposition of Professors Wigmore[28] and McCormick[29] to the prevailing rule that impeaching statements cannot be used as substantive evidence, but did not go into their reasoning, which would reject the limitation on the ground that the impeaching statement is not objectionable as hearsay because the witness who perceived is present in court and can be cross-examined under oath.

Judge Ward's refusal to instruct that the impeaching statement could be used only on the credibility issue left the statement with the jury both as impeachment of what was said by the witness in court and as proof of the truth of what was said to the contrary out of court. When he says that its use as substantive evidence may be made because of other evidence offered in the trial upon the same matter, would it not be difficult to conclude that it would not be substantive if other evidence were not introduced? The extrajudicial statement is the same whether other evidence is introduced or not. The Federal Rules, the Model Code and the Uniform Rules do not make this distinction. The inconsistent statements are admissible for what they are worth. They also require no instruction as they constitute evidence to be considered the same as any other relevant evidence. Attorneys will surely argue to the triers of fact their strength and weakness in the light of the circumstances surrounding them. The question of sufficiency of evidence could always be argued to the court or jury if there were no other evidence than the inconsistent statement to maintain an issue. Inasmuch as there are perhaps only rare cases in which other evidence that is consistent with the inconsistent statement is not in the trial record, the *Wallace* case is an important decision in accord with modern thinking that impeaching

28. 3 J. WIGMORE, EVIDENCE § 1018(b) (3d ed. 1940).
29. C. MCCORMICK, EVIDENCE § 39 (2d ed. 1972).

statements of the testimony of a witness testifying in court can be used as substantive evidence. They are not hearsay by the federal rule, but if classified as hearsay they constitute a reasonable exception to the rule of exclusion and are admissible as proof of the facts stated.

Out-of-Court Statement of Identification of a Person. Is it Hearsay?

Rule 801 (d) (1) (C) provides that the statement of identification soon after perception of a person is not hearsay. The testimony of what was said in the identification of a person as the one who committed a crime could come from three sources: third persons who were present at the identification and observed what took place, persons who had seen the crime committed and were themselves identifying witnesses, and the victim of the crime who identified the accused. Is the testimony of what occurred and what was said in an extrajudicial identification excludable as hearsay when offered in the trial of the accused as evidence of his identity? Is testimony of prior identification of the accused through photographs hearsay when offered to identify him?

There is a conflict in the cases upon the issue, some authorities regarding prior identification as hearsay and excludable, others considering it as direct substantive evidence of identity admissible in the trial as proof of the fact.[30] The federal rule takes the latter position and wisely so. The admission of prior statements of identification is not dependent upon contradictory testimonial evidence, which evidence would be necessary if it were offered for impeachment. The subject in inquiry in the trial is the identity of the accused, and the prior statements of identification are a part of the process of determining it. Any person who was present and participated in the prior identification or who heard the identification made by others is a competent witness if the identification witness is present in the trial and testifies upon the subject. For example, when the victim of a robbery testifies in the trial identifying the accused, he may also testify as to his former identification of the accused in a line-up or elsewhere. The prior identifications have more probative value, are usually much closer to the time when the events occurred giving rise to the issue and can be more meaningful than the testimony in court pointing out the accused. The circumstances surrounding the prior identification also assist the triers of fact in more accurate evaluation in testing the accused's identity. The statements of persons who observed the commission of a crime, whether the victim or passers-by, made when they saw the accused on the street or in a line-up or in

30. For cases indicating an equal division, see Annot., 71 A.L.R.2d 460-62 (1960).

the examination of photographs, are a source of proof related directly to the issue.

Courts have struggled with this question of admissibility, trying to find some way to make the prior identification escape the hearsay rule. In an Iowa decision,[31] the trial court attempted to avoid the hearsay rule by labeling as *res gestae* testimony concerning statements of identification made by the victim of a robbery. The declaration that the accused was positively the man was made as the accused walked onto the platform as the last man in a line-up. The appellate court disagreed with the trial court, stating that mere spontaneity of expression would not per se determine *res gestae*. The court disapproved the reasoning of the trial judge, but held the prior identification not to be prejudicial since the victim had identified the accused in the trial. The vital question of whether the prior statement of identification was hearsay, and thus excludable, was not discussed. The Florida First District Court of Appeal took a forward-looking position in *Willis v. State,* decided in 1968.[32] The victim of a store robbery and his employee testified from photographs and a police line-up concerning the accused's identification. Following them as a witness, a police officer testified that he was present and observed the victim select the accused from seventy-five photographs exhibited for examination, and was present when the victim and the employee identified the accused in the line-up. Thirty-eight years before, the Florida Supreme Court held in *Martin v. State*[33] that the testimony of the victim about his extrajudicial identification of the accused from photographs was admissible but, on a point not involved in the appeal, observed in dictum that testimony by officers or third persons that the victim identified the accused or his photograph was not admissible because it was hearsay.

In the *Willis* case the appeal was on this issue. The accused, whose defense was alibi, claimed that, on the testimony of the identifying witness alone, his chance of raising a reasonable doubt in the minds of the jury would have been much greater. Chief Judge Wigginton, after examining the divided authorities, concluded that the better rule is that the testimony of third persons who observed an identification is admissible as direct evidence of identity and is not objectionable as hearsay. In the trial the identifying witnesses had testified about their prior identification and the court stressed the corroborative effect of the third party's testimony, but admission was justified because

31. State v. Ayles, 219 N.W. 41 (Iowa 1928).
32. 208 So. 2d 458 (Fla. 1st Dist. Ct. App. 1968).
33. 129 So. 112 (Fla. 1930).

the identifying witnesses were present, testified in court and were subject to cross-examination by the accused.

The court adopted the same theory embraced in new rule 801 that when "the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (C) one of identification of a person made after perceiving him," it is not hearsay. When these conditions are met the hearsay aspect ceases and proof of the identifying statement may be given by the testimony of third persons who heard the statement made. What Chief Judge Wigginton said about corroboration was applicable to the facts of the *Willis* case in which the extrajudicial statements were corroborative. As long as the person who made the prior identification statement testifies in the trial with respect to identification and is available for cross-examination, the prior statement is admissible as relevant evidence on the issue.

On facts different from the *Willis* case the distinction becomes material. What rule applies if the victim of the crime or person who saw its commission testifies in the trial but does not identify the accused because of lack of memory or from fear? Is proof of the prior identification admissible through those present at the identification? The California court in *People v. Gould*[34] faced the problem in which the conviction depended on regarding the prior statements as direct substantive evidence of identity. The identification of Gould in the trial by the victim of the burglary was uncertain. She testified that it was hard for her to point out someone after all the time that had elapsed before the trial. On appeal, affirming the conviction, Justice Traynor said that her testimony did not amount to an identification but that the evidence of her extrajudicial identification was admissible as independent proof of identity. In the opinion the justice stated, "[t]he failure of the witness to repeat the extra-judicial identification in court does not destroy its probative value, for such failure may be explained by loss of memory or other circumstances. The extrajudicial identification tends to connect the defendant with the crime, and the principal danger of admitting hearsay evidence is not present since the witness is available at the trial for cross-examination."[35] In *Judy v. State*,[36] the Maryland court departed from its earlier, stricter holdings and approved the admission of prior identification as substantive evidence. The same position was taken by the Washington court in *State v. Simmons*,[37] in which many cases were reviewed and

34. 354 P.2d 865, 7 Cal. Rptr. 273 (1960).
35. *Id.* at 867, 7 Cal. Rptr. at 275.
36. 146 A.2d 29 (Md. 1958).
37. 385 P.2d 389 (Wash. 1963).

emphasis was placed upon the fact that the identifying witness and the witnesses to the identification testified in the trial and were available for cross-examination.

The question arises what the result would be if the alleged identifying witness called by the prosecution were to testify that the accused was not the person who robbed him and to deny that he had made the prior identification. Under rule 607 a party may impeach his own witness, and under rule 613 he may do so by proof of prior inconsistent statements. If the triers of fact believe that the prior statements had in fact been made, under rule 801 (d) (1) (A) they may be used as proof of the facts asserted.

Other problems may arise in the admissibility of prior identifications. In the case of *Gilbert v. California*,[38] the exclusion of a line-up identification was required because the accused was not represented by counsel, but the Court noted without criticism the current trend of admitting proper prior identifications as substantive evidence when the identifying witness testifies and is available at the trial for cross-examination. It appears that the Court had no objection to this admission if the requirement of the sixth amendment had been followed.

The new federal rule simply eliminates the hearsay obstruction in proof of prior identification. *United States v. Wade*[39] and the *Gilbert* case were directed to the constitutional problem of whether testimony of a prior identification or identification in court could be given by a witness who had observed the commission of the crime, when the identification was made after the filing of criminal charges and before the accused was represented by counsel. Both the in-court identification and testimony of the prior identification were excluded as violations of the sixth amendment. In the recent case of *Kirby v. Illinois*,[40] in which an identification at the police station of those accused occurred shortly after the commission of the crime and before any charges had been filed, the sixth amendment was said not to have been violated. The victim of the robbery was permitted to testify as to his prior identification and again identified the robbers in court. The key point of the majority opinion was that the out-of-court identification occurred before any formal charges against the defendants had been made. The majority opinion by Justice Stewart restricted the application of *Gilbert* and *Wade* to the facts of those cases in which the prior identifications came after the accused had been charged with the crime. The dissenting opinion by Justice

38. 388 U.S. 263 (1967).
39. 388 U.S. 218 (1967).
40. 406 U.S. 682 (1972).

Brennan, in which Justices Douglas and Marshall joined, stressed the loss of the sanction of evidence exclusion as a method of assuring that law enforcement officers will respect the constitutional right of the accused to have the assistance of counsel at the critical time of the out-of-court identification. The majority opinion does not regard that right to exist unless there has been a formal charge filed against the person who is identified.

This represents a material change in what was generally thought to be the effect of *Wade* and *Gilbert*. It reflects a changing attitude of the Court in which the rights of the public to protection from criminal acts are being given greater consideration and constitutional provisions are given a stricter construction. The wording of the sixth amendment providing for the accused "to have the Assistance of Counsel for his defence" leaves open for interpretation the meaning of "for his defence." The *Kirby* case interpreted "for his defence" to mean that the right under the sixth amendment does not arise until a person is charged with a crime. Though application of the fifth amendment in confession cases presents a different question, there is nothing in any of the sixth amendment cases that casts any doubt on the new federal rule's removal of the hearsay reason that prevented the introduction of evidence of a prior identification.

2. *Admissions by a Party-Opponent.*—Admissions by a party have usually been considered as an exception to the hearsay rule.[41] Ordinarily they have been statements against the interest of the party at the time they were made. In the decisions in which the statement was disserving when made, it was easy for the court to justify the exception for the reason that the party would not have made a statement against himself unless he believed it to be true. The disserving element created a circumstantial probability of reliability, which is the basic reason for exceptions to the hearsay rule. Admissions, while they may impeach the party-witness who has given contradictory testimony, are uniformly regarded as substantive evi-

41. The Model Code classified admissions as hearsay by designating them in rule 506 an exception to the exclusion of hearsay under rule 502. The Uniform Rules exclude hearsay in rule 63, which also provides for exceptions including admissions found in subdivisions (7) (admissions by parties), (8) (authorized and adoptive admissions) and (9) (vicarious admissions). Wigmore, however, places the subject of admissions under relevancy and states that they need not pass the gauntlet of the hearsay rule when offered against a party because the admitting party is the only one who could invoke the hearsay rule when the admission is offered by his opponent, and he need not examine himself. 4 J. WIGMORE, EVIDENCE § 1048 (3d ed. 1940). *See also* C. MCCORMICK, EVIDENCE § 262 (2d ed. 1972) (considering admissions separately from the hearsay rule and expressing the view that even if admissions are regarded as hearsay, the requirements for admission of the testimony have been satisfied).

dence of the admitted fact.[42] Furthermore the preliminary requirement of asking the witness whether he made the statement before permitting other witnesses to testify that he did so, as in the impeachment of a nonparty-witness, has never been required for the admissibility of admissions. An admission of a party-opponent may be introduced into evidence by the other party to support his cause as direct proof of the admitted fact.

Admissions must be distinguished from declarations against interest by a nonparty-witness, which are hearsay and are admitted under a separate exception. In early common law and in many modern courts the declaration against interest is a very narrow exception and is restricted to declarations against pecuniary and proprietary interests.[43] Admissions of a party have never had such limitations. The new federal rule 804 (b) (4) has greatly broadened the declaration against interest exception and includes almost any statement of a kind that the declarant would not normally make unless he regarded it to be true. Unlike admissions, declarations against interest in most states and under the new rule are not admissible unless the declarant is unavailable as defined by federal rule 804(a).[44] The disserving element of a declaration against interest at the time the statement is made goes to the very heart of this exception.

Is the disserving aspect of an admission at the time when the statement was made a requirement for its admissibility? If an admission is regarded as hearsay and if an exception to the hearsay rule is dependent upon a circumstantial probability of reliability, the answer is yes. The reliability factor is that the statement was against interest at the time it was spoken. Thus, if an admission is hearsay, a statement by the party-opponent that was self-serving when made, but against his interest in the trial in which it is offered, would be inadmissible because of the absence of circumstances indicating reliability. The problem was presented in a Michigan case[45] in which a wife, as beneficiary of a life insurance policy, brought an action against the insurance company after her husband's death. The defendant company claimed fraud perpetrated by a false representation in the insured's application for the policy, in which he stated that he never used stimulants to excess. As evidence in the trial that

---

42. *See* 4 J. WIGMORE, EVIDENCE § 1048 (4) (3d ed. 1940).

43. *See* Ward v. H.S. Pitt & Co., [1913] 2 K.B. 130; Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule,* 58 HARV. L. REV. 1 (1944); Morgan, *Declarations Against Interest,* 5 VAND. L. REV. 451 (1952).

44. UNIFORM RULE OF EVIDENCE 63(10) does not require unavailability. Otherwise, the federal rule is the same as the Uniform rule.

45. Krajewski v. Western & So. Life Ins. Co., 217 N.W. 62 (Mich. 1928).

the insured had used stimulants to excess, the defendant company offered the sworn pleading by the wife in a suit for divorce against the insured shortly after the insurance policy had been issued. In the pleading she stated that at that time and for five years in the past her husband became grossly drunk weekly, that each payday he returned home at midnight in a drunken condition and with his funds almost exhausted. Other detailed facts of his drunken condition were set out. These declarations were self-serving when made but were disserving to the plaintiff when offered by the defendant insurance company as proof of no liability on the policy. The statements in the pleadings of the divorce case were held admissible as admissions, the court not theorizing upon whether it was admitted as an exception to the hearsay rule. Courts generally test the admissibility of admissions by weighing their disserving effect in the case on trial, and of course that would be the only time when a party would offer them against his party-opponent. This calls into question whether an admission is hearsay and whether its admissibility depends upon an exception to the hearsay rule.

Federal rule 801 (d) states that admissions by a party-opponent are not hearsay, and then in subsection (2) specifies in detail the situations in which they are admissible. Why are admissions of a party-opponent not hearsay? The answer comes back to the reasons for the hearsay exclusion, that the party adversely affected does not have the opportunity to test the declarant by cross-examination under oath. Does the party-declarant need to test himself? Can he claim that his own statements when not made under oath are not reliable? The answer is in the negative to both questions, and thus he does not need the protection afforded by hearsay exclusion. Therefore, the new federal rule, well supported by reason, makes the firm statement that admissions by a party-opponent are not hearsay.

The question arises: what admissions by a party-opponent are admissible? Rule 801 (d) (2) says that a statement is not hearsay if:

> (2) *Admission by party-opponent.* The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Divisions (A) and (B) represent the law as it now is commonly applied. A person's statement against himself is admissible or, if he has representative capacity, it is admissible against the person represented. Division (B) is a statement of adoptive admissions in which one agrees or acquiesces to the statements of another. Silence when a person makes a discrediting statement about another in his presence, which under the circumstances would call for a protest, manifests belief in the truth of the statement constituting an admission by conduct.[46] Its weight is evaluated by what would be normal human behavior under the circumstances. In criminal cases, when the accusing statement is made by a law enforcement officer, the privilege against self-incrimination precludes the classification of silence as an admission because by silence the accused may be asserting the privilege rather than acknowledging or denying the truth of the statement.[47] The fifth amendment cases on custodial interrogation requiring the accused to be informed of his privilege to remain silent resolve this problem.[48]

Division (C) resolves a conflict in the common law by drawing no distinction between statements on subject matter that a principal has authorized the declarant to make to third persons and statements made by an agent to his principal.[49] As pointed out in the reporter's notes, Uniform rule 63 (8) (a) and the new California Code[50] make admissible as an admission a statement by a person authorized to make a statement "for him," that is, for the principal, whereas the federal rule uses the words "by him." New Jersey evidence rule 63 (8)-(a),[51] patterned after the Uniform Rules, changed this provision to one similar to that adopted in the Federal Rules. Although there is a conflict in the authorities, the better position is believed to be that taken in the federal rule. It admits as an admission statements concerning subject matter about which the declarant has been authorized to speak when the statements are made to his employer or another employee as well as when the statements are made to a third person.

46. *See* Sullivan v. McMillan, 8 So. 450 (Fla. 1890). A distinction is to be made when a person fails to reply to a letter in which a demand has been made, such as for the payment of money claimed to be due, or in which an accusation is made. The failure to reply is not an absence of conduct from which an admission may be inferred. *See also* Nicolaysen v. Flato, 204 So. 2d 547 (Fla. 4th Dist. Ct. App. 1967), *cert. denied*, 212 So. 2d 867 (1968); Falknor, *Silence As Hearsay*, 89 U. PA. L. REV. 192 (1940).

47. *Cf., e.g.*, Griffin v. California, 380 U.S. 609 (1965).

48. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

49. *See* the concurring opinion of Justice Gordon in Rudzinski v. Warner Theatres, Inc., 114 N.W.2d 466, 470 (Wis. 1962). *See also* Falknor, *Vicarious Admissions and the Uniform Rules*, 14 VAND. L. REV. 855 (1961).

50. CAL. EVID. CODE § 1222 (West 1966).

51. N.J. STAT. ANN. tit. 2A, ch. 84A (Supp. 1972).

Records made by an employee as requested by his employer are admissible against the employer although the record is an intra-company report not made for outside use. The high degree of trustworthiness of intra-company reports is equal to that of business records, which are admissible as an exception to the hearsay rule although they may be self-serving. Furthermore, there is no privilege that would preclude their use.[52]

Division (D) of rule 801 (d) (2) deals with a difficult problem in evidence; and as the position taken is the exact opposite to the rule commonly applied, it is surely one of the highlights of the new Federal Rules. The rule provides that when an admission by an agent or servant is made during the existence of the special relationship concerning a matter within the scope of the agency or employment it is admissible against the principal or employer. The majority of courts have viewed the matter through the concepts of the substantive law of agency and have excluded admissions about things the agents or servants were employed to do but about which they had been given no authority to speak.[53]

The trend is away from this position and in favor of the federal rule. Florida has taken a position in accord with the federal rule in the frequently cited case of *Myrick v. Lloyd.*[54] There the Florida Supreme Court held that an agent's admission that he was at fault in an automobile accident, which occurred while he was acting in the scope of the service he was asked by the principal to perform, was admissible against the principal. Justice Adams recognized the conflict of authority, but cited Wigmore[55] and said "we have chosen the above as the more practical and liberal rule."[56] In a later case in which an employee of a hotel stated facts showing liability, there was a similar holding in which Chief Judge Carroll of the Florida Third District Court of Appeal cited the *Myrick* case and stated that "[a]n admission against interest made by an employee in the course of and within the scope of his employment and relating to a matter which is not beyond the penumbra of his duties or employment, is

52. *See* 5 J. WIGMORE, EVIDENCE § 1557 (3d ed. 1940).

53. Branch v. Dempsey, 145 S.E.2d 395 (N.C. 1965), held inadmissible an admission by a truck driver when offered against his employer, but the separate opinion by Judge Sharp, *id.* at 411, gives an excellent and extensive discussion favoring the position taken in the Federal Rules. *Accord,* Federal Deposit Ins. Corp. v. Glickman, 450 F.2d 416 (9th Cir. 1971); Northern Oil Co. v. Socony Mobil Oil Co., 347 F.2d 81 (2d Cir. 1965); Pedersen v. Kuhr, 201 N.W.2d 711 (Iowa 1972); Wieneke v. Steinke, 233 N.W. 535 (Iowa 1930).

54. 27 So. 2d 615 (Fla. 1946).

55. 4 J. WIGMORE, EVIDENCE § 1078 (3d ed. 1940).

56. 27 So. 2d at 616.

a recognized exception to the hearsay rule, and such a statement by the employee will be admissible against the employer as an admission against interest."[57]

In a leading case, *Martin v. Savage Truck Line, Inc.*,[58] the court, after considering an 1886 case of the United States Supreme Court to the contrary,[59] held that an agent's admission consisting of facts about an accident that occurred in the performance of his duties was admissible against his employer. District Judge Morris stated:[60]

> The primary objection urged to a statement such as is here involved is that, while it was a statement against the interest of the person making it, subjecting him, as it did, not only to civil liability, but possibly to criminal sanctions, it cannot be considered a statement against the interest of his principal, because he was the agent of the principal only for the purpose of operating the vehicle, and not for the purpose of making statements concerning its operation. Undoubtedly the decision of the United States Supreme Court would be binding upon this Court and compel a decision that the proffered statement was not admissible, unless very real and drastic changes have occurred since that decision which compel a different holding now. It is noteworthy that in more recent times decisions and text writers have held the results of the decision mentioned to be totally at variance with present-day reality.

A Wisconsin case, *Rudzinski v. Warner Theatres, Inc.*,[61] has special reference value in presenting both sides of the problem. In the majority opinion it was held that the trial court was not in error in excluding the employee's admission, which was made to another employee and offered against their employer. The court discussed the authorities sustaining this view and then reversed on other grounds. An opinion by Justice Gordon, who concurred in the reversal but disagreed with the majority holding on the agency question, presents one of the most able and extensive presentations favoring the admissibility of the admissions by an employee against his employer when made concerning services he was employed to perform. He stated:[62]

---

57. Gordon v. Hotel Seville, Inc., 105 So. 2d 175, 177 (Fla. 3d Dist. Ct. App. 1958), *cert. denied*, 109 So. 2d 767 (Fla. 1959).

58. 121 F. Supp. 417 (D.D.C. 1954).

59. Vicksburg & Meridian R.R. v. O'Brien, 119 U.S. 99 (1886).

60. 121 F. Supp. at 418-19. *See generally* 4 J. WIGMORE, EVIDENCE § 1078 (3d ed. 1940).

61. 114 N.W.2d 466 (Wis. 1962).

62. *Id.* at 471.

> The test of admissibility should not rest on whether the principal gave the agent authority to make declarations. No sensible employer would authorize his employee to make damaging statements. The right to speak on a given topic must arise out of the nature of the employee's duties. The errand boy should not be able to bind the corporation with a statement about the issuance of treasury stock, but a truck driver should be able to bind his employer with an admission regarding his careless driving. Similarly, an usher should be able to commit his employer with an observation about a slippery spot on the lobby floor.
>
> It is enough to show the existence of the employment and the general nature of the employee's work. There may be cases where a further foundation will be needed to develop that the utterances are fairly within the employee's scope of authority. Surely there can be little doubt that a theater usher's range of discussion properly includes the clean-up of a wet lobby floor.

An odd situation occurs under the majority rule when the court holds a declaration to be an admission and not a spontaneous utterance and instructs the jurors that they may consider the admission by the truck driver against himself as a defendant but that they shall not consider it against the employer-defendant in determining the employer's liability.[63] When there is enough evidence apart from the admission to take the case to the jury against both defendants, is it conceivable that jurors will find the driver liable for negligence but hold the defendant employer not liable because they did not regard the evidence sufficient without the admission? When the employee and employer are joined as defendants, the only time the limited use of the employee's admission has a practical effect in the outcome of the trial is when the evidence, apart from the admission, is insufficient to take the case to the jury and the defendant employer makes a motion for a directed verdict, a situation that seldom occurs.

The new federal rule will resolve the conflict found in federal cases. It is believed to present the more enlightened and practical point of view. It has the support of Model Code rule 508 (a), Uniform rule 63 (9) (a) and Kansas and New Jersey, which have adopted this provision of the Uniform Rules. Judged on the basis of evidential values, it is sound. An agent or employee would not, while employed, want to make statements about what he had done in performing his services that admitted acts for which both he and his employer would be liable unless the statements were true.

Rule 801 (d) (2) (E) makes statements of one conspirator admissible

63. Wieneke v. Steinke, 233 N.W. 535 (Iowa 1930).

against others in the conspiracy if made in the course and in the furtherance of the conspiracy. It is not necessary that the admission be in the presence of the co-conspirator if it is made in the furtherance of the conspiracy and if the existence of the conspiracy is independently proven. The principles are well presented in the recent case of *United States v. Schroeder*,[64] in which statements by one conspirator in the planning of a robbery were admitted against another without regard for the presence or authorization of his associates in the crime. Other statements of one of the conspirators made after the robbery were held not admissible because not independently proven, but were admissible because made in the presence of the defendant conspirator and acquiesced in by him. The federal rule states the law as uniformly accepted and could be assumed as being within provision (D) of rule 801(d) (2) dealing with agency. As pointed out in the notes to the rule, the theory of agency of a conspirator's statement is at best a fiction, and provision (E) as stated in the federal rule makes it unnecessary to comment on it.

II. The Admission of Character Evidence

Character testimony is used primarily in two ways: to show the probability or nonprobability that a person did what he is claimed to have done and to test the credibility of a witness who testifies at a hearing. Different rules apply to each purpose for which evidence of character is offered. Federal rule 404 deals with the issue of probability and rule 608 relates to the credibility of witnesses. The method of proving character is set out in rule 405 and in rule 608 (a). The federal rules relating to the admissibility of character evidence clarify by stating in a simple form the law as it is commonly accepted, with one exception provided in rule 607, which permits a party to impeach his own witness without the limitation that the party calling him is surprised by his testimony. The use of prior convictions of a crime as a test of credibility is stated in rule 609, and the use of a judgment of conviction as proof of the facts that were required to sustain the conviction is provided for in rule 803(22) as an exception to the hearsay rule. Both of these rules resolve a material conflict in the law and will be considered in Part III of this article, which deals with admissibility of convictions for both purposes—to impeach and to prove.

---

64. 433 F.2d 846 (8th Cir. 1970), *cert. denied*, 401 U.S. 943 (1971).

A. Limitations on the Admissibility of Character Evidence

Federal rule 404, entitled "character evidence not admissible to prove conduct; exceptions; other crimes," provides:

> (a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) *Character of accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
>
> (2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (3) *Character of witness.* Evidence of the character of a witness as provided in Rules 607, 608, and 609.
>
> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. This subdivision does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Although habit of a person or the routine practice of an organization is admissible under rule 406 to prove conformity to habit on a particular occasion, under rule 404 character evidence is not admissible to prove conformity to character, except in criminal cases and upon credibility generally.[65] Rule 404 specifies the exceptions in criminal cases. Evidence of the accused's character offered to prove that he did or did not commit the acts he is charged with doing is admissible only if the accused places his character in issue by testimony of his good character. If he does so, the prosecution may introduce rebutting testimony. This is uniform law. It is not general moral character, but the pertinent trait of character, that may be shown. This is a significant limitation not always observed in the trial of criminal cases under existing law. Once character evidence is admitted, it may be used for its inferential value in showing innocence or guilt. Some courts say that an acquittal may be determined by character of the accused alone,[66] but other courts permit its use as

65. *See* p. 219 *infra.*

66. *See* United States v. Wooden, 420 F.2d 251 (D.C. Cir. 1969); Weedin v. United States, 380 F.2d 657 (9th Cir. 1967). *Compare* State v. McDowell, 290 N.W. 65 (Iowa

an inference to be considered in evaluating all of the evidence in the trial.[67] Actually, the distinction makes little difference because the jurors must always consider all of the evidence, and in the face of the evidence against the accused the good character must be strong enough under the circumstances to create a reasonable doubt in the minds of the jurors. Obviously, the prosecution can use bad character only as an inference consistent with guilt and there must be independent evidence to prove guilt beyond a reasonable doubt. Character evidence of the accused in many criminal cases becomes an important factor in determining the question of doubt. Section (2) of the rule permits admissions of evidence, offered by the prosecution, of the victim's character, but only after the accused has offered evidence that the victim's character is bad.

Rule 404 does not include for civil cases the use of character evidence to test the probability that acts were committed. This was a deliberate exclusion as indicated in the notes to the rule. While the use of character evidence upon this issue is uncommon, it has been used particularly in the fraud and deceit cases, and its use when relevant is provided for in Uniform rule 47. This use of character testimony in certain civil cases has received favorable comment[68] but is rejected because of its limited value as proof and because of its effect of sidetracking jurors from the evidence of what actually happened. The same reasoning applies in criminal cases, but there the accused must raise the issue and by tradition he is entitled to the benefit that may accrue.

Section (b) of rule 404 eliminates the use of other crimes, wrongs or acts to prove character of a person from which an inference might be drawn that actions in issue conform with character. One who does bad acts is not necessarily a habitual wrongdoer, and one whose conduct is generally good may at times depart from what is right. The danger of admitting evidence of specific bad conduct is that the triers of fact might readily conclude that if the accused has done the act before he must have done the act in issue, that he is a two-timer. All courts agree that the commission of other crimes or bad acts cannot be used to show the propensity of a person to do such

1940), *with* State v. Fador, 268 N.W. 625 (Iowa 1936); *see also* State v. Bell, 221 N.W. 521 (Iowa 1928). These cases indicate that, while character of the accused could be considered in determining a reasonable doubt, it should not overshadow decisive evidence to the contrary.

67. *See* Mannix v. United States, 140 F.2d 250 (4th Cir. 1944); Singer v. United States, 278 F. 415 (3d Cir.), *cert. denied,* 258 U.S. 620 (1922); Capello v. State, 90 So. 191 (Fla. 1921).

68. *See* Falknor, *Extrinsic Policies Affecting Admissibility,* 10 RUTGERS L. REV. 574, 581-83 (1956).

acts as proof that he did the act in question. The federal rule, in accord with authorities generally,[69] admits these other acts when relevant as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. While there may be danger of misuse, the value of such evidence is said to outweigh the danger when it is offered for these purposes.[70]

B. Reputation or Opinion or Both To Prove Character

Rule 405, entitled "methods of proving character," provides:

> (a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

This rule represents a material change in the law. In the federal courts, in Florida and in most states, character may be proved by reputation but not by opinion, and this has been the rule whether character evidence is offered on the issue of probability or credibility.[71]

---

69. A leading case on this subject is Williams v. State, 110 So. 2d 654 (Fla.), *cert. denied*, 361 U.S. 847 (1959), in which evidence of other criminal acts was held to be relevant and admissible to discredit the testimony of the accused's explanation of his acts made to show innocence. *See also* Green v. State, 190 So. 2d 42 (Fla. 2d Dist. Ct. App. 1966). In Hawkins v. State, 206 So. 2d 5 (Fla. 1968), evidence was held admissible showing that participation in other crimes made the offense part of a common scheme or plan. *Accord,* MODEL CODE OF EVIDENCE rule 311 (1942) and UNIFORM RULE OF EVIDENCE 55.

70. For a discussion of admissibility and the danger of its misuse, see Slough & Knightly, *Other Vices, Other Crimes,* 41 IOWA L. REV. 325 (1956); Note, *Evidence—Other Crimes,* 29 MICH. L. REV. 473 (1931); Note, *Evidence of Other Crimes in Montana,* 30 MONT. L. REV. 235 (1969); Note, *Admissibility of Evidence of Prior Criminal Acts in a Criminal Prosecution,* 13 U. FLA. L. REV. 372 (1960).

71. In the early common law, personal opinion was regularly used to show a witness's own belief about the trait of an accused's character, but in 1865 in the case of Regina v. Rowton, 10 Cox Crim. Cas. 25 (Eng. 1865), the English court excluded opinion based upon personal knowledge and limited the proof of character to reputation. The distinction was not made when character evidence was used to test credibility. In the early years of the United States, the distinction between opinion and reputation was not made; later the use of reputation alone became the uniform rule. For a discussion of these issues, see 7 J. WIGMORE, EVIDENCE §§ 1981-83 (3d ed. 1940). *See also* Ladd, *Techniques and Theory of Character Testimony,* 24 IOWA L. REV. 498 (1939); Ladd, *Credibility Tests—Current Trends,* 89 U. PA. L. REV. 166 (1940).

In Iowa, opinion testimony may be used to prove character of the accused as it relates to probability but not to attack the credibility of a witness; that may be done only by reputation as to character.[72] Wigmore and other writers have long advocated the admissibility of opinion evidence whenever character is an issue.[73] The committee drafting the new Federal Rules regarded the use of opinion to be so much the preferable means of proving character that it provided in the March 1967 draft for the use of opinion evidence and excluded the use of reputation evidence. It was the exact reversal of the then-existing federal law. As there are many situations in which evidence of reputation serves a useful purpose, a change was made in the March 1971 draft providing that a character witness can give testimony expressing his own opinion, or he may testify as to the reputation of a person. There is no reason why the same character witness cannot do both if he has sufficient knowledge to give the required preliminary foundation testimony. What a responsible person thinks about the character of one with whom he is well acquainted should be more meaningful than the conglomerate hearsay gossip of the community. Also, in urban living most people may have no reputation because of the lack of general comment, but it would be possible to find individual persons who had sufficient associations with another to have an opinion with respect to him.[74]

Subsection (b) authorizes the admission of specific instances of conduct when character or a trait of character of a person is an essential element of a charge, claim or defense. This represents existing law. It is illustrated in the case of *Harvey v. State*,[75] in which the accused was charged with rape and the question was whether there was consent by the prosecutrix. The trial court excluded evidence that, on another occasion, when several women and a man were drinking whiskey and dancing, she started to disrobe and when dared to do a strip tease she continued dancing while taking off her garments till she had on only her "panties." The case was reversed, the court holding that the ecdysiast performance before a lone man in these circumstances might imply consent to a later act.

---

72. *See* State v. Ferguson, 270 N.W. 874 (Iowa 1937); State v. Teager, 269 N.W. 348 (Iowa 1936). For a discussion of the issue, see Ladd, *Techniques and Theory of Character Testimony*, 24 IOWA L. REV. 498 (1939).

73. 5 J. WIGMORE, EVIDENCE §§ 1608-21 (3d ed. 1940); Ladd, *Techniques and Theory of Character Testimony*, 24 IOWA L. REV. 498 (1939).

74. *See* Hamilton v. State, 176 So. 89 (Fla. 1937), in which the general reputation in the community was not needed and the reputation of the accused in the place in the city where he was best known was admitted. *See also* Annot., 112 A.L.R. 1013 (1938).

75. 138 So. 2d 270 (Ala. Ct. App. 1962).

C. Character Evidence and Credibility of a Witness

The admission of character evidence to test the credibility of a witness requires a direct attack upon his credibility before evidence of good character may be introduced. The attack could be proof of a previous conviction of a crime or testimonial evidence that his credibility is unreliable, but proof of prior inconsistent statements is not enough.[76] Federal rule 608 (a) sets out the methods of proof and limits the use of character evidence to the proof of truthfulness and to the rebuttal of an attack upon character:

> (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

The new features of the federal rule are that it admits opinion evidence as well as reputation, as previously considered under rule 405, and it limits the proof on character for truthfulness. In this it accords with the wording usually used—reputation for "truth and veracity"—and now also for opinion upon the subject. Some states allow proof of general moral character upon the issue of truthfulness[77] but this has been excluded by the federal rule. While the totality of all human traits embodied in general moral character may be a good indication of a person's credibility, it carries too many possibilities for the witness to consider other vices than false swearing when testifying in respect to it.[78]

---

76. On requiring the accused to put his good character in evidence as to the trait involved before evidence of bad character may be shown, see 1 J. WIGMORE, EVIDENCE §§ 55-58 (3d ed. 1940). On the requirement that the character of a witness be attacked by the adverse party before evidence of good character for truthfulness may be shown, see 4 *id.* §§ 1104-22. The majority of courts do not allow character evidence to sustain veracity when the only attack upon the witness is self-contradiction or proof of prior inconsistent statements. *Id.* §§ 1108-09. In Florida, in accord with most courts, it has been held that proof of prior inconsistent statements by a witness is not enough of an attack upon his veracity to authorize the admission of earlier statements consistent with the testimony given in the trial. Wofford Beach Hotel, Inc. v. Glass, 170 So. 2d 62 (Fla. 3d Dist. Ct. App. 1965). *See* Alford v. Barnett Nat'l Bank, 188 So. 322 (Fla. 1939), a leading case discussing other situations in which the witness's character has been brought into question by the party-opponent so as to entitle the proponent of the witness or the witness, if he be a party, to introduce his good character for truthfulness.

77. *See* IOWA CODE § 622.18 (1971).

78. For discussion of the dangers of testing credibility by evidence of general moral character, see Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 184-87 (1940).

Federal rule 608 (b) makes a marked change in the law by permitting cross-examination in respect to specific instances of conduct, which are probative of truthfulness or untruthfulness and not remote in time, of the witness himself or of a witness who testifies as to his character for truthfulness or untruthfulness. The complexities in the cross-examination of a character witness who testifies to the reputation of the character of a person, as shown in the famous case of *Michelson v. United States*,[79] in which the accused was convicted of bribery, are now eliminated. In that case, which was decided when only reputation testimony was admissible, the defense counsel raised the issue of the character of the accused by asking him in his direct testimony if he had been convicted of a misdemeanor having to do with trading in counterfeit watch dials, which conviction he admitted. The question was asked to prevent the prosecution from doing so on cross-examination with more telling effect. On cross-examination the accused answered "no" to the question whether he had theretofore been arrested or summoned for any offense. Five witnesses were called to prove that he enjoyed a good reputation. After four witnesses had testified favorably that his reputation was good, they were asked on cross-examination if they had heard of the conviction which the defendant admitted in his direct examination. Two of them said they had and two said they had not. They were then asked if they had ever heard that the defendant on a specified date was arrested for receiving stolen goods, but none had heard this. All of this testimony was received over objection and the court, out of the presence of the jury, asked cross-examining counsel whether it was a fact that this arrest occurred, to which the counsel said it was and to support his good faith exhibited a record of the arrest that was not challenged. The error relied upon in the appeal was the admission into evidence of the questions about the former arrest. Error was claimed on the ground that specific instances of misconduct, other than convictions of a crime, cannot be admitted to attack or support credibility. This is a generally accepted rule and is included in federal rule 608 (b). But the court distinguished the situation in which the misconduct is used as evidence of character from the situation where the purpose of its admission is to show the unreliability of the character witnesses for not having heard of facts inconsistent with their testimony on reputation. If they had heard of the misconduct or of events that would impair the reputation of a person, the judgment of the character witnesses that the reputation was good would be questionable. Justice Jackson wrote an able and exhaustive opinion about the

79. 335 U.S. 469 (1948).

cross-examination of a character witness testifying upon reputation. He drew the distinction between asking the witness if he "had heard" of other misconduct and asking the witness if "he knew" of other impairing acts. The latter would be inadmissible because it would relate to personal opinion of character, whereas what he "had heard" was relevant to prove reputation and admissible for that purpose. The court's opinion was sound in logic but becomes less important with the new federal rule, which admits opinion testimony upon character. Furthermore, the rule, set out below, authorizes cross-examination as to specific instances to test the value of character testimony without reference to whether it is opinion or reputation evidence.

Rule 608 (b) provides:

> (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness himself or on cross-examination of a witness who testifies to his character for truthfulness or untruthfulness.
>
> The giving of testimony, whether by the accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

The last paragraph of the above rule is needed because in rule 611 (b) the former law applied in federal courts is changed so as to permit cross-examination upon any relevant issue in the case, including credibility, subject to the discretion of the judge to limit it with respect to matters not testified to on direct examination, if such limitation is in the interest of justice. The rule assumes that the privilege against self-incrimination is waived by testifying upon substantive issues, but when the testimony relates only to credibility the privilege may be claimed.

III. CONVICTIONS OF CRIME

Convictions of a crime are used in two ways when offered as proof in a trial. The most common use is for impeachment of the credibility of witnesses, and the law upon this subject varies from state to state and has lacked uniformity in the federal circuits. The other use arises when a judgment of conviction is offered in evidence in another trial to prove the truth of facts that were essential to finding

a verdict of guilty and rendering judgment of conviction. Upon this matter there is a wide conflict of views. Rule 609 concerning impeachment will be considered first.

A. Impeachment by Evidence of Conviction of Crime

Rule 609 (a) and (b) provides:

> (a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible, but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (2) involved dishonesty or false statement regardless of the punishment.
>
> (b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of his most recent conviction, the release of the witness from confinement imposed for or the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction, whichever is the later date.

An analysis of this rule shows both the breadth and the limitation of its application. It covers all crimes that carry a penalty of more than one year or of death. For these crimes it is not necessary that they relate to dishonesty or false swearing. If the crime were murder and the defense were that the killing occurred when the accused found the victim in bed with his wife and was so enraged that he killed, the conviction is admissible as an attack upon his credibility. The implication of untruthfulness from the conviction could be rebutted by proof of character evidence that the convicted person was a truthful man, but the conviction is nevertheless admissible as an attack upon his credibility. Model Code rule 106 and Uniform rule 21 provide that convictions of crimes not involving dishonesty or false statement are not admissible to impair credibility even though the crime is a serious one. The draftsmen of the federal rule felt, concerning crimes for which punishment was more than one year, that the court should not be required to psychoanalyze the truth-testing elements of the crime, that they were serious enough to warrant admissibility on the credibility issue. The federal rule is in accord with the rule of some states, which provides that previous convictions of a felony are admissible for impeachment without limitation upon the kind of felony. Some state codes, like the Model Code and the Uniform Rules, draw no distinction between felonies and misdemeanors but limit their use to those that are *crimen falsi,* or

related to dishonesty or false swearing.[80] The federal rule incorporates this test when lesser crimes are offered for impeachment. Rule 609 (a) (2) permits the use of convictions of lesser crimes for impeachment if they involve dishonesty or false statement, regardless of the punishment.

There is no specification in the Federal Rules concerning how the conviction may be proved or whether the identity of the kind of a crime for which the witness was convicted may be mentioned. On this subject, the recent Wisconsin case of *Nicholas v. State*,[81] in an opinion by Justice Hanley, gives a most illuminating and comprehensive discussion. By the law of that state the naming of the crime cannot be made in the impeachment process, but if the witness denies the conviction he may be asked for the purpose of identifying the conviction, if he had not been convicted of a specified crime at a designated time. The record of the conviction, showing what the crime was, may also be introduced as proof. In Iowa, the nature of a felony for which a witness had been convicted cannot be shown if the witness is the accused and is being tried for the same offense as that for which he was previously tried. The fear is that the jurors would use the prior conviction as evidence of probability that he was guilty of the same crime again in the case being tried.[82] The usual method of proof of prior convictions is inquiry on cross-examination or by introduction of the record of conviction. When the record is used, it is important to have additional testimony identifying the witness as the person who had been convicted.

It is observed from the federal rule that the use of convictions for impeachment is a matter of right for the party attacking credibility and that the court cannot exclude this use because the trial judge believes that its prejudicial effect in the case being tried would be greater than its value for impeachment. In the District of Columbia case of *Luck v. United States*,[83] it was held that the trial court had discretion in determining its prejudicial effect, which would permit the exclusion of evidence of prior convictions for impeachment in deserving cases. The *Luck* case had wide judicial recognition and a provision in accord with it was included in the March 1971 draft of the proposed Rules, but it had not been included in the 1967 draft.

80. *See generally* Ladd, *supra* note 78, at 174-84.

81. 183 N.W.2d 11 (Wis. 1971).

82. *See* People v. Granillo, 36 P.2d 206 (Cal. 2d Dist. Ct. App. 1934); State v. Concord, 154 N.W. 763 (Iowa 1915).

83. 348 F.2d 763 (D.C. Cir. 1965). For clarification in the application of the *Luck* case, see Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), an opinion by then Judge Burger. For a recognition of the rule but a denial of its application under the facts of the case, see Nicholas v. State, 183 N.W.2d 11 (Wis. 1971).

In the final draft as submitted to the United States Supreme Court and to Congress, the provision that the court could exclude convictions if the probative value of the evidence were substantially outweighed by the danger of unfair prejudice was withdrawn. The provision was removed for two reasons. First, after the *Luck* decision, which was based upon the court's interpretation of a District of Columbia statute,[84] Congress enacted a statute applicable to the District eliminating the interpretation given in *Luck* by making impeachment by prior convictions a matter of right.[85] Thus the adoption of the proposed Federal Rules of Evidence will not be jeopardized by including a provision offensive to Congress. The other reason was a consideration of the policy aspect of the proposal; if the matter were left to the individual discretion of the trial judge the law would be applied unevenly, some courts rejecting a prior conviction and others admitting it upon similar factual situations. Actually, in all cases the use of prior convictions to impeach the credibility of the accused is prejudicial to him,[86] but the relevance of the convictions to the truthfulness of his testimony is held to justify their admission. The problem is open to reasonable debate but the Federal Rules in their final form have taken a position commonly followed prior to the *Luck* case.

Rule 609 (b) limits the use of previous convictions for impeachment to those within a ten-year period from the date of the most recent conviction or the expiration of parole, probation or sentence with respect to the most recent conviction, whichever is the later date. The limitation is fair in excluding remote convictions because of their weakened value as a test of credibility; it also places a premium upon good living for those who have shifted from the wrong to the right path of life.

Paragraph (c) of the rule broadens provisions formerly admitted

---

84. D.C. CODE ANN. § 14-305 (1966).

85. District of Columbia Court Reform and Criminal Procedure Act of 1970, § 133, 84 Stat. 604 (1970).

86. In People v. Granillo, 36 P.2d 206, 211 (Cal. 2d Dist. Ct. App. 1934), Justice Willis said:

> It is a matter of common experience and knowledge that once the average juror learns that the defendant has previously been convicted of a crime of the same class as that for which he is being tried, that juror will consciously or unconsciously consider and allocate to a type or class the man on trial, as distinguished from the admeasuring of his credibility as the witness on the stand; and this despite all instructions by the court . . . .

This might be controlled somewhat by not designating the nature of the crime in introducing evidence of a conviction, but even the ordinary process of the human mind is such that it would naturally gravitate toward the conclusion that the accused was of bad character and ought to be put away, which a verdict of guilty would do.

to sustain the credibility of witnesses whose convictions have been shown by abandoning the use of convictions when certain events have occurred. It provides:

> (c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, based on a substantial showing of rehabilitation and the witness has not been convicted of a subsequent crime, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on innocence.

B. Juvenile Adjudications of Delinquency

Rule 609 continues:

> (d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The judge may, however, allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

Legislation establishing juvenile courts or giving other courts juvenile jurisdiction prevents the use of the proceedings and adjudications as tests of credibility or for other purposes except when the same delinquent later appears upon another matter before a juvenile court making the adjudication.[87] Although serious criminal acts may have been committed by a juvenile, the adjudication in respect to him is not designated a conviction of a crime; the juvenile is simply determined to be a delinquent and placed in custody in a public institution for rehabilitation rather than for punishment. The juvenile judge was given almost unlimited discretion without restriction by the rules of evidence and by the procedures of the law that help to assure just factual determinations required for adults. The freedom of the judge to simply talk things over with the juvenile and determine what he regards best for him removes all semblance of a regular court hearing although a decision could result in his custodial confinement in an industrial school until he becomes an adult. Because of the

87. See 1 J. WIGMORE, EVIDENCE § 196 (2) (c), at 673 n.5 (3d ed. 1940), for a listing of state statutes. Courts have generally not regarded juvenile adjudications as usable for impeachment. Thomas v. United States, 121 F.2d 905 (D.C. Cir. 1941); Cotton v. United States, 355 F.2d 480 (10th Cir. 1966). See the reporter's notes to rule 609 citing the authorities mentioned and giving an informative discussion of the reasons for the new federal rule.

requirement of confidentiality and because of the inconclusiveness of factual determinations, juvenile adjudications have been generally excluded when offered as tests of credibility when the juvenile appears as a witness. This distressed Wigmore, who felt strongly that they should be admitted for impeachment purposes, especially in sex offense cases.[88]

An extensive review of the juvenile court process and its laxity in factual determinations is found in the monumental case of *In re Gault*.[89] The Court recognized the salutary objectives of the juvenile court legislation but held that it failed to give the juvenile the same constitutional protections that are accorded to an adult, even though juvenile adjudications often result in custodial confinement of a minor far in excess of a penitentiary or other sentence of an adult convicted for similar misconduct. The Court also observed the failure of correctional institutions to achieve the rehabilitation contemplated and looked upon them as but a different form of custodial confinement. Therefore the Court held that in juvenile adjudications the minor is entitled to adequate notification to him and his parents of the specific complaint against him; that all of the requirements of the privilege against self-incrimination, confrontation and cross-examination be observed; that the right of counsel to represent the minor at the hearing be assured; and that constitutional protections guaranteed to an adult also belong to a juvenile. This decision changes the complexion of a juvenile adjudication and makes it more reasonable to admit into evidence for impeachment purposes an adverse adjudication on a serious matter. This does not mean wide use of juvenile adjudications as impeachment evidence because, as stated in the beginning of the federal rule, they are not generally admissible. The position taken would have satisfied Dean Wigmore as his forceful condemnation of the exclusion of juvenile adjudications was largely directed to those cases in which the evidence would be highly relevant to the issue of truthfulness of the juvenile witness.[90]

The last division of rule 609 found in paragraph (e) recognizes the presumption of the correctness of a trial court's judgment rendered upon a verdict for conviction until there is a reversal upon appeal. During the pendency of appeal the conviction may be used for impeachment but the fact of appeal may be shown to vitiate the impeachment value of the conviction.

---

88. 3A J. WIGMORE, EVIDENCE § 980 (rev. ed. 1970).

89. 387 U.S. 1, 12-31 (1967). This is part of the ably written majority opinion of Justice Fortas.

90. *See* 1 J. WIGMORE, EVIDENCE § 196 (3d ed. 1940); 3A J. WIGMORE, EVIDENCE §§ 924a, 980 (rev. ed. 1970).

Rule 609 is a highlight in the new Rules as it provides for a different application of the use of prior convictions for impeaching purposes: tightening the application in places, broadening it in others and resolving conflicts. The new rule excludes convictions founded on a plea of *nolo contendere,* convictions followed by governmental action showing rehabilitation and convictions pardoned for innocence.

C. Judgment of Conviction as Proof of Facts Essential To Sustain the Conviction

Should a record of a judgment of conviction be admissible in a civil case involving fact issues similar to those that were necessarily determined in a criminal trial in order to sustain a conviction?[91] Can the conviction be used as proof of the truth of those facts when they are being litigated in a civil trial? Does the conviction amount to more than the opinion of another jury in the criminal case that the facts had been established? Does the requirement in a criminal trial that the facts be proved beyond a reasonable doubt justify the admission of the conviction? Should there be a distinction between an action instituted by the accused in a civil case and an action in which the accused is not a party in determining the admissibility of a judgment of conviction when the issuable facts in the criminal and civil case are the same? Is the judgment of conviction hearsay when offered in another trial to prove the facts embodied in it? Is it hearsay of a fact or is it hearsay of an opinion of the jury in a criminal trial of the truth of facts essential in that case? If it is hearsay, is an exception to the exclusionary rule justified by the requirement in a criminal trial that the facts be proved beyond a reasonable doubt? If it is an opinion, and thus ordinarily excludable under the rule that witnesses must testify to facts and not express their opinion upon them, should variation in the opinion rule be made to authorize the admission of the judgment of conviction? If the proof beyond reasonable doubt requirement in criminal cases justifies the admission of the conviction as proof of facts as an exception to the hearsay rule, is it not based upon the assumption that the opinion objection does not apply? Is an acquittal in a criminal case admissible to support the position of the accused when he is a party in civil litigation? Does the acquittal indicate what the verdict would have been had the jury applied the standard of preponderance of the evidence? If acquittals are held

91. See C. MCCORMICK, EVIDENCE § 318 (2d ed. 1972), for thoughtful discussion of admissibility of judgments in previous cases, especially criminal convictions offered in subsequent civil cases. See also the reporter's notes to federal rule 803(22). An extensive annotation on the subject is found at 18 A.L.R.2d 1287 (1951).

to be inadmissible in civil cases but convictions are admitted, can the distinction be made for any reason other than the reliability factor? What other reasons would there be?

Is the reason for admitting the prior conviction of the accused, in a civil action brought by him, the public policy against letting a person profit by his own wrong? Would this reason apply if the parties in the civil litigation were other than the accused? Is the reason for admissibility the public policy that a conviction in a criminal case and a successful decision in a civil case requiring an opposite determination of the truth of facts would be such a discredit to the administration of justice and so shocking to the public conscience that measures should be taken to prevent it? If this is the basic reason for admitting the conviction, would it not apply to civil cases in which others than the accused were parties to litigation that involved the same facts upon which an accused person had his road paved to the penitentiary?

Should a judgment of conviction in a criminal case be regarded as creating an estoppel or as being res judicata in a civil action on the same facts or should it be admitted only as evidence of the facts involved in the conviction for what it is worth? Would the identity of parties as well as issues required for res judicata warrant the conclusive effect of the conviction? How serious should the crime be for a conviction to be admitted in another case? Courts have varied in their holdings in answer to the foregoing questions and for variegated reasons. The Federal Rules represent the current thinking upon the subject and are based upon the reliability value of the judgments of conviction as evidence more than the policy considerations. The Rules solve the problem by providing for their admissibility as an exception to the hearsay rule only in cases where the conviction has been for a serious crime.

Rule 803, entitled "hearsay exceptions: availability of declarant immaterial," provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere*), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

The federal rule indicates that the reasoning behind it is not public policy but that the conviction by proof beyond reasonable doubt creates a high degree of reliability. Thus it limits the admissible conviction to those in which the authorized punishment for the crime is death or imprisonment in excess of one year. In these cases in which the crime charged is serious there is not only a strong motive to defend, but also every opportunity to do so through cross-examination and other techniques. In less serious cases, such as the violation of traffic laws, the same motive would not be present and a conviction would not be as reliable to establish the truth of the evidential facts as it would if the crime were a serious one. Also, juries, in determining whether there is a reasonable doubt, may weigh the evidence less carefully for minor crimes than for serious crimes.

In the Florida cases, the statement has been broadly made that a judgment of conviction in a criminal case cannot be introduced in a civil trial to prove the truth of facts essential to the conviction.[92] The cases in which the issue was involved, however, were civil cases considering the negligence of the defendant, and a conviction for reckless driving was excluded from evidence. The same result would be reached under the federal rule in the traffic violation cases, unless the criminal charge was one in which the punishment could be for more than one year, such as indictment for manslaughter for a homicide resulting from reckless driving. In a recent case, *Boshnack v. World Wide Rent-A-Car, Inc.*,[93] involving the speed of a car, a plea of guilty upon which a judgment of conviction was rendered was held admissible as an admission. The Federal Rules would have excluded it, although making no distinction between a judgment based on a plea and one based upon a jury verdict, because the traffic violation was not serious enough. The Florida decision should make attorneys aware of the damaging effect of a plea of guilty in minor offenses and cause them to try a criminal charge of traffic violations when the events claimed to have occurred may also become the basis of a civil action. The person who pleads guilty and pays a fine as a convenient means of disposing of the matter may be in trouble if what he has plead

92. *See* Moseley v. Ewing, 79 So. 2d 776 (Fla. 1955); Stevens v. Duke, 42 So. 2d 361 (Fla. 1949). In each of the cases the statement of the rule as announced was that it was subject to exceptions. The exceptions, although not designated, may be those for which the federal rule provides admissibility. In accord with these Florida decisions on traffic violations, see Brooks v. Daley, 218 A.2d 184 (Md. 1966); Bolen v. Buyze, 167 N.W.2d 808 (Mich. Ct. App. 1969); Gray v. Grayson, 414 P.2d 228 (N.M. 1966), *cited in* C. MCCORMICK, EVIDENCE § 318, at 740 n.28 (2d ed. 1972).

93. 195 So. 2d 216 (Fla. 1967). In Gray v. Grayson, 414 P.2d 228 (N.M. 1966), the reason for excluding a careless driving conviction was the lack of its probative force as evidence of negligence.

to becomes the subject of civil litigation. Although a conviction upon a plea of guilty necessarily amounted to an admission of a traffic violation, when put to the test of its probative value, is it strong enough to be admitted? If admitted, the accused ought to be permitted to testify giving the reason why he entered the plea and the amount of the fine, if it was small, in order to mitigate its damaging effect.

Should judgments of conviction of serious crimes be conclusive upon the issues when the accused is one of the parties in subsequent civil litigation? It has been held that if the accused has been convicted of arson and later brings an action upon a fire insurance policy to recover for the fire loss, the conviction is determinative of the civil action.[94] Likewise, in an action by a husband-beneficiary of a life insurance policy on his wife, the husband was precluded from recovery because of a conviction for first degree murder of his wife.[95] The cases in which the convicted person seeks recovery in a civil action are based primarily upon the theory that one should not be able to benefit from his own wrong, but most cases limit the use of the prior conviction to its evidential value in establishing a prima facie case. The introduction of the conviction as evidence of the facts that sustained it would appear to have a very strong influence upon the jury in a civil case in the absence of a convincing explanation. If convictions may be used as evidence of the facts embodied in them rather than as a conclusive determination of those facts, there should be less resistance to wider adoption of rules permitting their admissibility. Also, the rule would apply to cases in which the accused was not a party but in which all or some of the essential facts in issue were the same as those on which the conviction depended. The probative value of the conviction would be the same whether the accused was or was not a party to the civil litigation. The situation is somewhat analogous to the broader admission of testimony given in a different proceeding as provided in federal rule 804 (b) (1). It creates an exception to the hearsay rule by admitting former testimony "at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of a party against whom now offered."

94. Eagle, Star and British Dominions Ins. Co. v. Heller, 140 S.E. 314 (Va. 1927). If there had not been an estoppel and if the court had regarded the conviction as evidence only, the jury might have decided favorably to the accused as plaintiff in the civil action in spite of his conviction of the same fact issue; that is what happened in North River Ins. Co. v. Militello, 88 P.2d 567 (Colo. 1939). Usually, the conviction would have a more persuasive effect.

95. Travelers Ins. Co. v. Thompson, 163 N.W.2d 289 (Minn. 1968), *appeal dismissed*, 395 U.S. 161 (1969).

This rule dispenses with the necessity as it existed in common law of identity or privity of parties as a condition for admitting former testimony and requires similarity of motive and interest as the test of probative value. Federal rule 803(22) admits prior convictions for their evidential value but without conclusive effect in a civil trial.

The rule does not extend the admissibility of a conviction as proof of facts "when offered by the Government in a criminal prosecution for purposes other than impeachment" in criminal cases in which the convicted person is not a party. In civil cases relevancy, determined by the similarity of the facts, is the test of admissibility of prior conviction irrespective of who the parties are. In a criminal case in which the formerly convicted accused is being tried upon another offense and in which some of the fact issues are the same as those in the former conviction, the prior conviction is admissible as evidence of those facts against him. If all of the fact issues were the same as in the former trial, the former conviction would ordinarily terminate the trial on a plea of double jeopardy. But assume the same acts by the accused, if he did them, constituted separate crimes, one against a state and the other against the federal government. Under the new rule it appears that a judgment of conviction in the state court is admissible in a subsequent federal trial as evidence of the truth of the facts required to sustain the state conviction. Conviction of state crimes will serve a useful purpose as evidence in federal criminal cases involving transportation across state lines, such as the transportation of stolen property or violations arising under the Mann Act.[96] For their use, the convicted person must be the accused in a criminal trial in which the conviction is offered. If persons other than the accused are the defendants in a criminal trial, his former conviction is not admissible as evidence of facts against them. The wording of the federal rule is specific and clear but does require thoughtful analysis to see its different applications. This provision removes what might be constitutional issues the Rules seek to avoid, although all of the Rules are subject to the test of constitutionality and may be changed by act of Congress or other rules adopted by the Supreme Court.

A judgment of conviction upon a plea of *nolo contendere* is not admissible under the Federal Rules as proof of the involved facts. Such pleas are common in antitrust suits and provide a means of disposing of many cases in which the plea authorizes the court to pronounce judgment without an acknowledgment of guilt in what might be a long and unnecessary trial. If the judgment of conviction on a

96. 18 U.S.C. §§ 2421-24 (1970).

nolo plea could be used as evidence of the facts assumed in rendering the judgment, it would discourage its use and contradict its purpose in the many cases that are best disposed of in this way.[97]

The rule concludes with a provision that the pendency of appeal does not prevent admissibility of a judgment of conviction, but may be shown for the intangible effect it may have in evaluating the force of the conviction. The admission of a conviction of a crime may be claimed to have a prejudicial effect upon the claim of the person or party against whom it is offered, whether it be used to test credibility or offered as proof of facts. Evidence is not excluded because it is prejudicial if it is relevant to the issues for which it is offered, unless the prejudice is so great that it absorbs the rightful use for which it is admitted. In weighing the probabilities, the need of the triers of fact and of the court to have all available relevant information having probative value in order to reach a just decision should be a paramount consideration.

CONCLUSION

It is believed that the Federal Rules that have been considered in this article represent a significant development and improvement in the law of evidence. Are they highlights of the Rules? Really not.

97. The plea of *nolo contendere* in recent years has been widely used in criminal antitrust and tax violation cases and in all kinds of other criminal cases as well. When the plea has been made, the court may impose any sentence that could have been imposed had the accused pleaded guilty, with the possible exception of the death penalty which, by statutes and possibly by state constitutions, is the province of the jury. In a 1912 federal case, Tucker v. United States, 196 F. 260 (7th Cir. 1912), it was stated that a fine only could be imposed on a *nolo* plea, not imprisonment. This was dictum, however, as the sentence was a fine. Some states take this view, but in Hudson v. United States, 272 U.S. 451 (1926), a sentence of imprisonment for conspiracy was upheld, Justice Stone writing the opinion and giving an historical review of the use of the plea. A leading recent case, Peel v. State, 150 So. 2d 281 (Fla. 2d Dist. Ct. App. 1963), *cert. denied,* 380 U.S. 986 (1965), held that the court could impose a life sentence on the accused in a first degree murder case under a plea of *nolo contendere.* Acting Chief Judge Allen, in an extensive opinion, considered Florida and other state and federal cases in a thorough analysis of the problem. The plea is sometimes spoken of as an implied admission or confession of guilt or other similar expression, but the court does not make an adjudication of guilt. The *nolo* plea is the equivalent of a plea of guilty for the purpose of sentencing only and has no effect other than in the particular case. The plea avoids an admission of guilt and indicates the accused's desire not to contend the charges against him while realizing that the court will impose punishment when he does not do so. It is generally held that a judgment on a *nolo contendere* plea cannot be used in a civil case against the defendant. Tseung Chu v. Cornell, 247 F.2d 929 (9th Cir. 1957), *cert. denied,* 355 U.S. 892 (1958). *But cf.* State v. Evans, 94 So. 2d 730 (Fla. 1957). The new federal rule is consistent with former federal holdings in limiting the plea of *nolo* to the case in which the sentence is imposed and preventing its admission to prove the facts of the charge in civil or other cases. *See* Annot., 89 A.L.R. 2d 540 (1963); Annot., 152 A.L.R. 253 (1944).

They are just interesting or even exciting to lawyers and judges who, as members of the bar, are intrigued by logic and reason as applied to their critical task of solving the unending conflicts arising out of human behavior. All of the new Federal Rules are highlights in a sense, and they become more so when used in advice to clients upon matters in which there are disputed questions of fact or in the courtroom where the decision upon them may ultimately be made. A study of all the new Federal Rules and the exceptionally informative and well-written notes accompanying them will be a worthwhile undertaking by members of the legal profession. A careful examination of the Rules may cause lawyers and bar associations to initiate a review of state laws of evidence to accomplish needed improvement in the administration of justice. Any state undertaking this task will be aided by the new Federal Rules, which represent years of study and long hours of devoted work by able trial lawyers, judges and teachers of evidence who had the benefit of nation-wide suggestions and criticism in their formulation. If states were to adopt the Federal Rules, with variations only as they may deal with the few matters of special state concern, members of the bar would benefit from rules that would uniformly apply in state and federal courts.